STATE OF MICHIGAN

COURT OF APPEALS

VALERIE E. SFREDDO and JOSEPH SFREDDO, Plaintiffs-Appellants, v UNIVERSITY OF MICHIGAN REGENTS and UNIVERSITY OF MICHIGAN HEALTH SYSTEMS, Defendants-Appellees.	UNPUBLISHED January 31, 2006 No. 249912 Court of Claims LC No. 02-000179-MH ON REMAND

Before: Bandstra, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

This case is before us on remand from the Supreme Court for reconsideration in light of the Court's decision in *Mayberry v General Orthopedics, PC*, 474 Mich 1; 704 NW2d 69 (2005). After reviewing the decision and analysis in *Mayberry*, we reverse the trial court's orders granting defendants' motions for summary disposition and remand this matter for further proceedings consistent with this opinion.

The facts underlying this appeal were aptly stated in our prior opinion:

> This case arises from plaintiff Valerie Sfreddo[']s allegations that she sustained injuries during a magnetic resonance imaging (MRI) procedure conducted at the University of Michigan Medical Center on March 9, 2000. On May 18, 2000, plaintiffs' counsel at the time sent a letter to defendants' general counsel stating that notice was being given as required under MCL 600.2912b for a claim of professional negligence. On March 5, 2002, approximately twenty-two months after issuing their first notice and just days before the expiration of the statute of limitations, plaintiffs' subsequently retained counsel sent a second letter to defendants that again stated that notice was being given under MCL 600.2912b for a claim of medical malpractice. On September 3, 2002, plaintiffs filed their complaint for medical malpractice arising out of the claimed injury occurring during the MRI conducted on March 9, 2002.
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> Defendants moved for summary disposition under MCR 2.116(C)(7) asserting that plaintiffs' action was barred by the two-year statute of limitations

> for a medical malpractice action, MCL 600.5805(5).[1] The trial court determined that plaintiffs' initial notice of intent met the minimum requirements of the notice statute and therefore granted defendants' motion. In effect, the trial court's decision indicated that plaintiffs' second notice did not toll the running of the statute of limitations pursuant to MCL 600.5856(d).[2] However, the trial court also allowed plaintiffs time to file an amended complaint to allege ordinary negligence.
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> After plaintiffs filed an amended complaint, defendants filed a second motion for summary disposition under MCR 2.116(C)(7) maintaining that the amended complaint also stated a claim of medical malpractice that was barred by the statute of limitations. The trial court granted this motion and dismissed the case, determining that the allegations of the amended complaint raised questions of medical judgment. [*Sfreddo v University of Michigan Regents*, unpublished opinion per curiam of the Court of Appeals, issued August 19, 2004 (Docket No. 249912), slip op at 1-2 (footnotes omitted)].

Relying on *Ashby v Byrnes*, 251 Mich App 537, 544-545; 651 NW2d 922 (2002), wherein it was held that the prohibition against "tacking" found in MCL 600.2912b(6) precluded an amended or second notice of intent from tolling the medical malpractice limitations period even if the first notice was provided more than 182 days before the end of the limitations period, we affirmed the trial court's grant of summary disposition in favor of defendants.[3] See *Sfreddo*, *supra* at 2. In doing so, we noted that "the intent of the statutory scheme, as identified in *Ashby*, is to allow only the initial notice to result in the tolling of the statute of limitations," and thus we rejected plaintiff's challenge of the sufficiency of the original notice, reasoning that to permit "a plaintiff to attack his own notice frustrates this intent because a subsequent notice can then become the one that determines whether the statute of limitations is tolled." *Id*.

The Supreme Court subsequently released its decision in *Mayberry*, *supra* at 3, wherein it held that "a second notice of intent to sue, sent with fewer than 182 days remaining in the limitations period, can initiate tolling under § 5856(d) as long as the first notice of intent to sue did not initiate tolling." In reaching this conclusion, the Court expressly disagreed with *Ashby*, concluding that

> the prohibition in § 2912b(6) against tacking only precludes a plaintiff from enjoying the benefit of multiple tolling periods. It does not, as *Ashby* held, restrict

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[1] MCL 600.5805(5) was renumbered as MCL 600.5805(6) by 2002 PA 715, effective March 31, 2003.

[2] MCL 600.5856 has been amended such that the text of MCL 600.5856(d) is now found at MCL 600.5856(c). See 2004 PA 87, effective April 22, 2004.

[3] MCL 600.2912b(6) provides in relevant part that "[a]fter the initial notice is given to a health professional or health facility under this section, the tacking or addition of successive 182-day periods is not allowed, ..."

> the application of the tolling provision in § 5856(d) to the initial notice of intent to sue if the tolling provision in § 5856(d) did not even apply to the initial notice of intent to sue. Stated otherwise, if the initial notice did not toll the statute of limitations period, there would be no problem of "successive 182-day periods" that § 2912b(6) prohibits. [*Mayberry*, *supra* at 7-8 (footnote omitted).]

Thus, under *Mayberry*, the sufficiency of plaintiffs' initial notice of intent is of no import because, regardless whether the notice was or was not valid, it was filed before there were less than 182 days remaining in the limitations period and therefore did not serve to toll the statute of limitations. Rather, the second notice of intent, filed with only four days remaining in the limitations period, was the only notice that could have tolled the limitations period and did in fact toll the period for 182 days. Plaintiffs therefore had until September 10, 2002, to file their complaint. Consequently, the filing of their complaint alleging medical malpractice on September 3, 2002 was timely, and summary disposition in favor of defendants was, therefore, improper.

Reversed and remanded.[4] We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra

[4] Although in our prior opinion we also affirmed the trial court's summary disposal of plaintiff's complaint alleging ordinary negligence on the ground that the claims sounded in medical malpractice and were thus barred by the medical malpractice period of limitations, our directive on remand requires only reconsideration of our prior decision in light of *Mayberry*. Therefore, we affirm our decision in that regard.